

ORIGINAL

United States District Court

United States Courthouse
219 South Dearborn Street
Chicago, Illinois 60604

ILLINOIS
COMMERCE COMMISSION

2003 DEC -11 A 9:38

Michael W. Dobbins,
Clerk

November 26, 2003

CHIEF CLERK'S OFFICE
Office of the Clerk

Illinois Commerce Commission
527 East Capitol Ave
Springfield, IL 62701

Docket # 00-0393

Re: Illinois Bell Telephone Co., Inc. v. Kevin K. Wright, et al.

USDC No: 02 cv 4121

Dear Illinois Commerce Commission:

A certified copy of an order entered on 11/12/03 by the Honorable Suzanne B. Conlon remanding the above-entitled case to the Illinois Commerce Commission, is herewith transmitted to you for your files.

Sincerely yours,

Michael W. Dobbins, Clerk



By: Adam G. Avalos
Deputy Clerk

Enclosure(s)
Copy to attorneys of record

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Suzanne B. Conlon	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	02 C 4121	DATE	11/12/2003
CASE TITLE	ILLINOIS BELL TELEPHONE CO., INC. vs. KEVIN K. WRIGHT, et al.		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

- (1) ☐ Filed motion of [use listing in "Motion" box above.]
- (2) ☐ Brief in support of motion due _____.
- (3) ☐ Answer brief to motion due _____. Reply to answer brief due _____.
- (4) ☐ Ruling/Hearing on _____ set for _____ at _____.
- (5) ☐ Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
- (6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
- (7) ☐ Trial[set for/re-set for] on _____ at _____.
- (8) ☐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.
- (9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]
☐ FRCP4(m) ☐ Local Rule 41.1 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).
- (10) ☒ [Other docket entry] This case is remanded to the Illinois Commerce Commission for reconsideration in light of the Federal Communications Commission's triennial review order. Plaintiff's motion for judgment on the merits [28-1] is moot. SEE REVERSE FOR DETAILS.

A TRUE COPY-ATTEST
MICHAEL W. DOBBINS, CLERK
By: *[Signature]*
DEPUTY CLERK
U. S. DISTRICT COURT, NORTHERN
DISTRICT OF ILLINOIS
DATE: 11/26/03

Suzanne B. Conlon

- (11) ☒ [For further detail see order on the reverse side of the original minute order.]

<input type="checkbox"/> No notices required, advised in open court. <input type="checkbox"/> No notices required. <input checked="" type="checkbox"/> Notices mailed by judge's staff. <input type="checkbox"/> Notified counsel by telephone. <input type="checkbox"/> Docketing to mail notices. <input type="checkbox"/> Mail AO 450 form. <input type="checkbox"/> Copy to judge/magistrate judge.	CB	courtroom deputy's initials	11/12/2003 11/12/2003 11/12/2003 11/12/2003 11/12/2003	number of notices NOV 13 2003 date docketed <i>[Signature]</i> docketing deputy initials 11/12/2003 date mailed notice PW mailing deputy initials	Document Number 88

ORDER

Illinois Bell Telephone Company, Inc., now known as SBC Illinois ("SBC Illinois"), challenges determinations made by the Illinois Commerce Commission ("the Commission") pursuant to the § 252(e)(6) of the Telecommunications Act of 1996 ("the Act"). In essence, SBC Illinois claims the Commission's order requiring it to allow competing local exchange carriers access to portions of its network ("unbundling") is contrary to federal law. As telecommunications providers benefitting from the Commission's determination, Covad Communications, AT&T Communications of Illinois, Inc. and Data Net Systems, L.L.C. (collectively, "intervenor") intervened in this action. After the parties' briefed the merits of this case, the Federal Communications Commission ("FCC") issued its triennial review order ("FCC order"). The Commission requests remand to reconsider its determination in light of the FCC order. SBC Illinois and the intervenors object to remand.

Under the Act, "any party aggrieved by [a State commission] determination may bring an action in an appropriate Federal court to determine whether the agreement or statement meets the requirements of section 251 of [the Act]." 47 U.S.C. § 252(e)(6). The parties agree that the Commission's legal determinations are subject to *de novoreview*. See *Illinois Bell Telephone Co. v. Wright*, 245 F.Supp.2d 900, 905 (N.D.Ill.2003) ("Federal district courts have uniformly held that a state agency's legal determinations are to be reviewed *de novo*"). Any other determinations are reviewed under the arbitrary and capricious standard. *Id.* In other words, the court is "not empowered to substitute its judgment for that of the agency." *Id.* Indeed,

[o]ne of the fundamental justifications for the administrative process is that an agency possesses an expertise in a particular subject area that the judiciary, as it is presently structured, cannot acquire at an acceptable cost. That justification does not come into play in a particular case unless the agency has in fact applied its expertise. Thus, part and parcel of our deference to agency findings and interpretations is the 'responsibility of the agency to explain the rationale and factual basis for its decision.' Were it not for the administrative law principle that an agency's decision must stand or fall upon the particular rationale the agency has chosen, it would be difficult, if not unworkable for a reviewing tribunal to ensure the proper execution of the legislative will through agency action. For an agency to 'proceed on the right path may require or at least permit the agency to make qualifications and exceptions that the ... [reviewing tribunal] would not.' Thus, unless we find that a particular conclusion is compelled as a matter of law, we may not pass upon an issue *de novo*, but must rather remand it to the appropriate agency for that agency's determination. To do otherwise, would 'propel... [this] court into the domain which Congress has set aside exclusively for the administrative agency.'

Brock v. Dow Chemical U.S.A., 801 F.3d 926, 932 (7th Cir. 1986)(internal citations omitted). In their supplemental briefs, the parties disagree about the impact of the FCC order on the Commission's determination. Specifically, SBC Illinois contends the FCC order requires reversal while the intervenors claim the FCC order does not impact the Commission's orders to the extent they were based on Illinois law. The Commission does not take a position on this issue, but explicitly requests remand to reconsider its decision in light of the FCC order.

The FCC order provides in relevant part:

If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling the element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and 'substantially prevent' implementation of the federal regime, in violation of section 251(d)(3)(C).

FCC Order at ¶ 195. Although "unlikely," the Commission's decision may be consistent with the new federal regime. However, the Commission has not yet had an opportunity to make this determination. To that end, the Commission intends to reopen the underlying proceeding. The FCC order specifically contemplates a remand:

Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation. It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules.

Id. Remand is appropriate to allow the Commission to reconsider its decision in light of the FCC order. See *Florida Power & Light Co. v. Lorion*, 470 U.S. 429, 744 (1985) ("[I]f the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"). See also *Board of Trade of the City of Chicago v. SEC*, 187 F.3d 713, (7th Cir. 1999) ("Normally, when a court... concludes that an agency's decision is not adequately supported, it remands so that the agency may enlarge the record or apply correct legal principles to the existing record").

Nevertheless, SBC Illinois "vigorously opposes a remand" because the Commission should have reconsidered its decision when *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), was issued. Supp. Reply at 1. SBC Illinois fails to offer any legal authority supporting its position. Nor does SBC Illinois explain how it will be prejudiced by a remand when it specifically requested remand in its opening brief on the merits. See Opening Brief at 30 (requesting "remand... to the ICC with instructions to conform its Orders to federal law, including the FCC's forthcoming new unbundling rules on remand from *USTA*..."). SBC Illinois similarly fails to explain how a determination of the tariffing issue by this court in its favor will moot the unbundling issue purportedly covered by the FCC order. To the contrary, SBC Illinois previously acknowledged that the tariff requirement is based exclusively on its unbundling obligations. See Supp. Brief at 2, citing *Id.* at 3-7 ("The ICC also required SBC Illinois to file a tariff for the unbundling of the Project Pronto DSL architecture. That requirement is unlawful because SBC Illinois cannot be required to unbundle the Project Pronto DSL architecture" under the FCC order). SBC Illinois' objections to remand lack merit.

Suzanne B. Conlon